counsel to apply for leave to appeal out of time and for a stay of execution in regard to the ejectment order till after the hearing of the appeal. This motion was was filed on 20th May, a Thursday and a half holiday, and hearing was fixed for Saturday, the next working day, and also the day on which the District Court summons was to be heard.

In the affidavit supporting the motion Chua Kwong Pow alleges that his reason for not entering an appeal in due time was that he failed to see his counsel in time and was misinformed by that counsel's clerk that no appeal lay from the order of the Board, and secondly that he is now instructed by new counsel he briefed after receiving the District Court summons that a point of law arises for decision in regard to the order of the Board.

As to the first ground taken, there is nothing but the allegation of the petitioner to rely on. The dates of his attempts to consult his previous counsel are not given nor is there any supporting affidavit by the clerk corroborating petitioner's story. It is laid down in *Coles* and *Ravenshear*[1] that a mistake by counsel (and a *fortiori* his clerk) as to the effect of a rule is not good ground for granting special leave to appeal and does not amount to special circumstances. I agree with the ruling of the Court that a successful party has a vested right in an order of Court in his favour and should not be deprived of an advantage given him by the rules *unless there has been on his part some conduct raising an equity against him or in a case of inevitable accident.* In this case Chew Poh Choo has been guilty of no laches; she at once gave notice she would go into occupation on expiry of the time granted in the order of the Board, and also sent a reminder shortly before due date. Chua Kwong Pow, instead of taking advice of counsel, was satisfied with that of a clerk, and in the face of the letters received from Chew Poh Choo took no action to prosecute his appeal. In my view there is no substance in this ground of his application for extension of time.

His second ground is that a point of law arises for decision. In this regard it may be noted that this point could have been taken before the Board and the Court is not informed as to whether it was so taken or not, and the Court must assume that it was so taken, and that if an appeal had been lodged it would have formed one of the grounds of appeal. In my view the fact that a point of law may be raised on appeal does not go to the question of whether an appeal out of time should be allowed. It does not amount to a special circumstance in that most appeals are based on points of law or fact.

The motion contemplates that the appeal should should be made under the provisions of Order VI of the Civil Procedure Rules and section 531 of the Civil Procedure Code, but in my view these sections do not apply. It is laid down in the Leases and Tenancies (Dispossessed Persons) Board Rules, G.N. 4858 of 17th July, 1947, Rule 8, that in appeals from the Board a Notice of Appeal must be filed within 4 days of the order appealed against, and that thereafter the practice and procedure regulating appeals from the Lower Civil Court to the Supreme Court shall apply. This precludes any recourse to the Civil Procedure Code or any other Code until such notice has been filed in the Board's office and shuts out any application for leave to appeal out of time, except one based on the Supreme Court's inherent and unlimited power to make such orders as may be necessary for the ends of justice. That power must be used only in circumstances in which it is crystal clear that grave injustice would follow if it was not used and in this case it is by no means clear.

For these reasons no order for extension of time will be made and the motion will be dismissed with costs.

Motion Dismissed.

M. M. ALLY & CO. v. CHELLAMAH (f).

[App. Civil Juris. (Russell, J.) June 3, 1948]
[Selangor — C.A. No. 17 of 1947]

Courts (Restriction of Civil Jurisdiction) Ordinance 1946, s. 3 (c),(d),(e) and Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance 1947, s. 2 (2)(d) — Whether Court has jurisdiction to hear case — What constitutes a valid tender — Contract Enactment (Cap. 52) s. 38.

In this case the Appellants appealed against the decision of the learned trial Judge on two grounds:— (1) that the learned District Judge had no jurisdiction to hear and determine the suit; (2) that a letter from their solicitors dated the 28th November 1946 offering to send a money order for $50/- and a cheque for $125/- on the Respondent undertaking to issue receipts for payment thereof was a valid tender.

Held, (1) that the provisions of paragraph (d) of sub-section (2) of Section 2 of the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance 1947 apply and the learned District Judge was not barred from hearing and determining the suit; (2) that there was no valid tender of the rent in this case as a mere offer by post to pay an amount due unaccompanied by any money is not a valid tender.

Case referred to :—

(1) *Ismail Bhai Rahim and others v. Adam Osman and others,* A.I.R. (1939) Cal. 131.

CIVIL APPEAL.

R. Ramani & P. P. Nair for Appellants.

F. J. Woodward for Respondents.

Russell, J. : —The Plaintiff/Respondent is the owner of certain premises situate at No. 4, Ceylon Road, Kuala Lumpur which have been let since December 1, 1942 to the Defendants/Appellants at a monthly rental of $25/-. In her plaint she alleged that the Defendants/Appellants had failed to pay the rent from the month of August, 1945 to the date of the plaint, and that on the 21st March, 1947, the date of notice to quit served by her on the Defendants/Appellants, the rent was more than 14 days in arrear. The notice to quit expired on the 30th of April, 1947.

She further alleged that one of the conditions of the tenancy was that the Defendants/Appellants should do no repairs without her permission and any repairs so carried out were to be paid for by the Defendants/Appellants. She admitted that the Defendants/Appellants had tendered her certain rents but since they had made unauthorised deductions from the rent due claiming that the deductions had been lawfully spent on repairs without her permission she had refused to accept the sums of money tendered. The Defendants/Appellants having failed to comply with notice to quit the Plaintiff/Respondent claimed possession of premises and arrears of rent.

The Defendants/Appellants in their defence admitted the rent was in arrears from March, 1946, but said that the rent had in fact been tendered before service of the notice to quit and that the Plaintiff/Respondent had refused to accept it. They further stated that the Plaintiff/Respondent was informed of the bad state of repair and that they were compelled to carry out repairs to make the premises habitable.

When the case came on for trial before the learned District Judge counsel for the Defendants/Appellants contended that the Court had no jurisdiction to hear the case, having regard to the provisions of Section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946.

The learned District Judge came to the conclusion that he had jurisdiction and proceeded to hear the case. He found as a fact that the rent had been paid or tendered from the month of October, 1945 to the end of August, 1946, and that a sum of $112.70 which he held the Defendants/Appellants had lawfully expended on certain repairs covered the rent from the beginning of September, 1946 until the middle of January, 1947. He therefore gave judgment for the Plaintiff/Respondent on the ground that on the 21st March, 1947, the rent for part of the month of January and the whole of the month of February was in arrear.

The Defendants/Appellants appealed on two grounds :—

Firstly, on the ground that having regard to paragraphs (c), (d) and (e) of Section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, the learned District Judge ought to have held that he had no jurisdiction to hear and determine the suit.

As to paragraph (c), I hold that the cause of action arose after the expiration of the prohibited period.

As to paragraph (d) I hold that the provisions of paragraph (d) of sub-section (2) of Section 2 of the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947 apply, and the learned District Judge was not barred from hearing and determining the suit.

Since the Defendants/Appellants have since October 1945 been paying and tendering Straits Settlements currency, I am of the opinion that paragraph (e) of Section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946 does not apply.

Secondly, the Defendants/Appellants appealed on the ground that a letter from the solicitors of the Defendants/Appellants dated the 28th November, 1946 offering to send a money order for $50/- and a cheque for $125/- on the Plaintiff/Respondent undertaking to issue receipts for payment thereof was a valid tender. The learned District Judge found that it was not a valid tender on the ground that it was conditional upon receipts being issued. I agree that it was not a valid tender but on the ground that a mere offer by post to pay an amount due unaccompanied by any money is not a valid tender.

Section 38 of the Contract Enactment (Cap. 52) is identical with Section 38 of the Indian Contract Act and at page 272 of the 6th Edition of *Pollock and Mulla's* Indian Contract and Specific Relief Acts it is stated that a tender of money in payment must be made with an actual production of the money. This proposition was doubted in a decision of Panckridge, J. in the Calcutta case of *Ismail Bhai Rahim and others v. Adam Osman and others*[1]. In the 7th and latest

Edition of *Pollock and Mulla* the footnote to page 253 states that the statement in the 6th Edition may be too wide. The production of the money is undoubtedly the best proof that a debtor is able and willing there and then to pay his debt and in the absence of further authority I am not prepared to follow the decision in the Calcutta case.

I therefore dismiss this appeal with costs. Vacant possession to be delivered by July 31st 1948.

Appeal Dismissed.

VARTHAMMAL v. TAN YEE MOH.

[App. Civil Juris. (Pretheroe, Ag. C.J., M.F., Murray-Aynsley, C.J., S. and Russell, J.) June 4, 1948]
[Ipoh — Civil Appeal No. 25 of 1947]

Rent and Charged Land (Restriction) Enactment — Necessity of demand for rent.

This was an appeal by the landlord from a judgment of Mr. Justice Evans in favour of the tenant (See (1948) M.L.J. 55).

Held, (1) that where rent is claimed by privity of estate and not on a covenant the landlord must demand the rent on the demised premises; (2) that there was a conflict of evidence in this case as to whether there was a demand of the rent on the premises and as to whether the rent was payable in advance or in arrear and that therefore there must be a retrial.

CIVIL APPEAL.

S. M. Sharma for the Appellant.

Lim Cheng Ean for the Respondent.

Pretheroe, Ag. C. J. : — In this appeal I have had the advantage of reading the judgment of Murray-Aynsley, Chief Justice, Singapore, and I am in agreement with his conclusion and his reasons therefor.

On one point I wish to add a few words of my own. After the exchange of letters dated the 23rd of June, 1947, and the 24th of June, 1947, respectively, it was obvious that a vital point in this case was whether the rent was payable in advance or in arrear. It was also known that the tenant was in occupation of the premises by virtue of an agreement with the previous owner and not by virtue of one with the present owner who was the plaintiff in the original action. Yet, in her evidence, the plaintiff never once referred to the point while the witness Muthiah only referred to it indirectly and inconclusively. He said that on the 28th or 29th of each month the plaintiff gave him a signed receipt for the following month to hand to defendant *when the rent was paid,* and again that "on the 2nd or 3rd of every month the rent was paid".

The rent receipts exhibited in this case are inconclusive for present purposes and may even indicate that the method of payment was changed some time after the plaintiff became the landlord.

The only evidence regarding this matter given by the defendant was "I pay on the last day of every calendar month. Rent is due then". Most of the rent receipts bear two dates: that shown on the body of the receipt is that on which the plaintiff signed it and which, as already stated, was prior to the payment, while the second was endorsed on the receipt by Muthiah when he received the rent. If those endorsements were correctly made they show that in fact defendant rarely paid on the last day of any month. Thus his evidence, though apparently definite, is greatly discounted. In such circumstances it is impossible for an appellate tribunal to decide a point which must be decided before a decision can be reached, and therefore I agree that the case must be heard again before a different District Court Judge.

I agree with Murray-Aynsley, Chief Justice, Singapore, regarding the payment of costs.

Murray-Aynsley, C. J. : This appeal arises out of what was originally a suit in the Taiping District Court to obtain possession of premises in that town. It appears that one Tan Yee Moh was tenant of No. 297 Kota Road, Taiping. We know nothing as to the terms of the tenancy. Some time or other, we do not know the exact date but it seems to have been near the beginning of the month of November, 1945, one Varthammal purchased the property. Soon afterwards the purchaser wanted the premises for her own occupation and took steps to recover possession. The first step that she took was to cause a letter to be sent by Mr. Sharma, her solicitor, on May 19th, 1947, which appears at page 29 of the record. At that time the tenant was protected by Rent and Charged Land (Restriction) Enactment. On June 3rd of the same year Mr. Sharma wrote a further letter which appears at page 21. Later the owner took proceedings in the District Court (on August 6th). In these proceedings the owner had to show that rent was 14 days in arrear in order to avoid going before the Rent Board. The period for which the rent was alleged to be in arrears was that which immediately followed June 1st. In order to succeed the owner had to prove that rent was payable in advance. At the hearing the evidence seems to have been directed to this point and also to the question of whether or not there was a demand for the June rent on the premises.